(6)

No. 95-365

Supreme Court, U.S.
FILED
FEB 16 1996
FEB 14 1996
CLERK
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONER

WALTER A. SMITH, JR.*
DANIEL B. KOHRMAN
AUDREY J. ANDERSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington D.C. 20036
(202) 457-0800

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

* Counsel of Record

Counsel for Petitioner

50 pp

QUESTION PRESENTED

Whether Congress intended to exempt the federal government—and only the federal government—from paying damages for harm caused by its violations of Section 504 of the Rehabilitation Act.

PARTIES TO THE PROCEEDINGS

James Griffin Lane was the plaintiff in the district court and the appellant in the court of appeals on the issue of damages. The defendants in the district court, and the appellees in the court of appeals on the issue of damages were: Federico F. Peña, the Secretary of Transportation; Thomas Matteson, the Superintendent of the United States Merchant Marine Academy; and A.J. Herberger, the Administrator of the Maritime Administration.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Statement of Facts	3
B. The Decisions of the District Court	5
C. The *Dorsey* Decision	7
D. The Parties' Stipulation on Damages Issues	8
E. The Court of Appeals' Decisions in *Lane*	8
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. IN DETERMINING WHETHER CONGRESS INTENDED TO PERMIT MONEY DAMAGES IN THIS CASE, THE COURT SHOULD TAKE INTO ACCOUNT ALL RELEVANT INDICIA OF CONGRESSIONAL INTENT	10
II. CONGRESS HAS CONSISTENTLY INDICATED ITS INTENTION THAT ALL VICTIMS OF DISABILITY DISCRIMINATION, INCLUDING VICTIMS OF FEDERAL-AGENCY DISCRIMINATION, SHOULD RECEIVE FULL AND EQUAL RELIEF	14

A. The 1973 Enactment Of Section 504 Created A Private Right Of Action 15

B. The 1978 Amendments To Section 504 Authorized Private Claims Against Federal Defendants Without Any Express Reservation Or Limitation 16

C. The 1986 Amendments Explicitly Rejected Any Distinction Between Private And Public Defendants With Regard To Remedies 21

D. The 1992 Amendments Reaffirmed Congress' Intention To Provide All Remedies Against Federal Defendants 23

E. The Underlying Policies And Purposes Of The Act Reaffirm Congress' Intent Still Further 24

III. THIS COURT'S SOVEREIGN IMMUNITY JURISPRUDENCE CONFIRMS THE AVAILABILITY OF DAMAGES AGAINST FEDERAL DEFENDANTS UNDER SECTION 504 27

CONCLUSION 39

TABLE OF AUTHORITIES

Page

CASES:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 26

Alexander v. *Choate*, 469 U.S. 287 (1985) 15, 18, 25

Anderson v. *John L. Hayes Constr. Co.*, 243 N.Y. 140, 153 N.E. 28 (1926) 36

Ardestani v. *INS*, 502 U.S. 129 (1991) 36

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 21

Atchison, T. & S.F.R. Co. v. *Buell*, 480 U.S. 557 (1987) 37

Bell v. *Hood*, 327 U.S. 678 (1946) 32

Block v. *North Dakota*, 461 U.S. 273 (1983) 11, 13, 22

Bowen v. *City of New York*, 476 U.S. 467 (1986) 37

Cannon v. *Univ. of Chicago*, 441 U.S. 677 (1979) ..... *passim*

Carey v. *Piphus*, 435 U.S. 247 (1978) 26

Carter v. *Orleans Parish Public Schools*, 725 F.2d 261 (5th Cir. 1984) 22

Ciampa v. *Massachusetts Rehabilitation Comm'n*, 718 F.2d 1 (1st Cir. 1983) 22

City of Riverside v. *Rivera*, 477 U.S. 561 (1986) 26

Consolidated Rail Corp. v. *Darrone*, 465 U.S. 624 (1984) ..... *passim*

Cosmopolitan Shipping Co. v. *McAllister*, 337 U.S. 783 (1949) 37

Davis v. *Passman*, 442 U.S. 228 (1979) 19

Davis v. *Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979) 18

Decatur v. *Paulding*, 39 U.S. (14 Pet.) 497 (1840) 35

Dellmuth v. *Muth*, 491 U.S. 223 (1989) 12

TABLE OF AUTHORITIES—Continued

	Page
Doe v. *Attorney General*, 941 F.2d 780 (9th Cir. 1991)	*passim*
Dooley v. *United States*, 182 U.S. 222 (1901)	32
Dorsey v. *United States Dep't. of Labor*, 41 F.3d 1551 (1994)	7, 11
EEOC v. *Wyoming*, 460 U.S. 226 (1983)	13
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	28, 30, 31
Franchise Tax Bd. of Calif. v. *United States Postal Serv.*, 467 U.S. 512 (1984)	12, 24
Franklin v. *Gwinett County Public Schools*, 503 U.S. 60 (1992)	*passim*
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976)	26
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	13
Guardian Ass'n. v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)	20
Heilweil v. *Mount Sinai Hosp.*, 32 F.3d 718 (2nd Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995)	38
Hilton v. *South Carolina Public Rys. Comm'n*, 502 U.S. 197 (1991)	13
International Union of Operating Eng'rs, Local 150 v. *Flair Builders, Inc.*, 406 U.S. 487 (1972)	22
J.L. & K.P. v. *Social Security Admin., 971 F.2d 260* (9th Cir. 1992)	7, 24
Johnson v. *Runyon*, 47 F.3d 911 (7th Cir. 1995)	38
Keifer & Keifer v. *Reconstruction Fin. Corp.*, 306 U.S. 381 (1939)	12
Kendall v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838)	33
Kling v. *County of Los Angeles*, 769 F.2d 532 (9th Cir.), *rev'd on other grounds*, 474 U.S. 936 (1985)	22

TABLE OF AUTHORITIES—Continued

	Page
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	35, 36
League of United Latin Am. Citizens v. *Wilson*, 1995 WL 699583 (C.D. Cal. Nov. 20, 1995)	22
Leary v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977)	18
Lehman v. *Nakshian*, 453 U.S. 156 (1981)	21, 31, 34
Library of Congress v. *Shaw*, 478 U.S. 310 (1986)	34
Lindahl v. *OPM*, 470 U.S. 768 (1985)	23
Lloyd v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977)	18
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)	32
Marvin H. v. *Austin Indep. School Dist.*, 714 F.2d 1348 (5th Cir. 1983)	22
McKennon v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995)	26
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 (1982)	18, 23
Miener v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982)	22
Newman v. *Piggie Park Enters., Inc.*, 390 U.S. 400 (1968)	26
Owen v. *City of Independence*, 445 U.S. 622 (1980)	26
Pandazides v. *Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994)	9, 15, 22
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989)	12
Pfizer, Inc. v. *Government of India*, 434 U.S. 308 (1978)	22
Russello v. *United States*, 464 U.S. 16 (1983)	21
School Bd. of Nassau County v. *Arline*, 480 U.S. 273 (1987)	25

TABLE OF AUTHORITIES—Continued

	Page
Smith v. *Robinson*, 468 U.S. 992 (1984)	22
Southeastern Community College v. *Davis*, 442 U.S. 397 (1979)	25
Traynor v. *Turnage*, 485 U.S. 535 (1988)	22, 25, 38
United Handicapped Fed'n v. *Andre*, 558 F.2d 413 (8th Cir. 1977)	18
United States v. *Aetna Casualty & Surety Co.*, 338 U.S. 366 (1949)	36
United States v. *Kaufman*, 96 U.S. 567 (1877)	33
United States v. *Kubrick*, 444 U.S. 111 (1979)	36
United States v. *Lopez*, 115 S. Ct. 1624 (1995)	13
United States v. *Massachusetts Maritime Academy*, 762 F.2d 142 (1st Cir. 1985)	27
United States v. *Mitchell*, 463 U.S. 206 (1983)	11, 36
United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992)	8, 11, 12, 28
United States v. *Williams*, 115 S. Ct. 1611 (1995)	11, 36, 37, 38

STATUTES:

11 U.S.C. § 106 (1988)	28, 29
28 U.S.C. § 1254(1)	2
42 U.S.C. § 1988	26
42 U.S.C. §§ 2000e-5(f),(g)	30
46 U.S.C. § 1295(c)	27
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103	30
Rehabilitation Act of 1973:	
Section 504(a), 29 U.S.C. § 794(a)	*passim*
Section 505(a)(2), 29 U.S.C. § 794a(a)(2)	2, 20

TABLE OF AUTHORITIES—Continued

	Page
Section 505(b), 29 U.S.C. § 794a(b)	2, 6, 20
Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845:	
42 U.S.C. § 2000d-7	3, 21
42 U.S.C. § 2000d-7(a)(2)	21
Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955	16-17, 20

RULES AND REGULATIONS:

56 Fed. Reg. 37292 (1991)	17

LEGISLATIVE MATERIALS:

124 *Cong. Rec.* 13,901 (May 16, 1978)	17
124 *Cong. Rec.* 30,346 (Sept. 20, 1978)	26
124 *Cong. Rec.* 38,551, 38,552 (Oct. 14, 1978)	17
138 *Cong. Rec.* S16,609 (daily ed. Oct. 5, 1992)	24
S. Rep. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373	18, 25
S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908	26
Justification of the Budget Estimates: Hearings Before a Subcomm. of the Comm. on Appropriations, 104th Cong., 1st Sess. 775 (1995)	27

OTHER AUTHORITIES:

1 Op. Off. Legal Counsel 210 (1977)	17
Note, *Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act*, 1986 Duke L.J. 197	15

TABLE OF AUTHORITIES—Continued

Page

Sarah Poston, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 504 Damages Issue*, 1992/1993 Ann. Survey Am. L. 419 (Jan. 1994)..... 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-365

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The June 2, 1995 and June 5, 1995 orders of the court of appeals are unreported and are reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-4a. The December 22, 1994 order of the district court is unreported and is reprinted in the Appendix to the Petition at 5a-10a. The October 26, 1994 memorandum opinion and order of the district court is reported at 867 F. Supp 1050 and is reprinted in the Appendix to the Petition at 11a-63a. The Petition was granted on January 5, 1996.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 504(a) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(a), provides [in pertinent part]:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 505(a)(2) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(a)(2), provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [Section 504 of the Act].

Section 505(b) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(b), provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

A. Statement of Facts

The question before the Court is whether Congress intended federal agencies to be liable for damages caused by their violations of Section 504 of the Rehabilitation Act. The facts material to this question are undisputed and were stipulated to by the parties. *See* Pet. App. 8a-10a; Joint Appendix ("J.A.") 13-20.

In 1990, petitioner James Griffin Lane applied for an appointment to the United States Merchant Marine Academy ("the Academy" or "the USMMA"), a federal institution of post-secondary education in Kings Point, New York that trains students to serve in the merchant marine of the United States. In early 1991, Lane received a congressional nomination and thereafter received notice of his appointment to the Academy.[1] He

[1] *See* Mem. in Supp. of Pl.['s] Mot. for Prelim. Inj., *Lane* v. *Peña*, Civ. No. 94-1608 (D.D.C. July 22, 1994), Attachments 2

entered the USMMA in July 1991, after receiving medical clearance from the Department of Defense Medical Examination Review Board. Pet. App. 15a-16a.

During his first year at the Academy, Lane was diagnosed as having diabetes mellitus and reported this fact to the Academy's Chief Medical Officer. *Id.* at 15a-16a. Prior to his second year at the Academy, Lane began insulin therapy. His father informed the Academy of this development in late July 1992. *Id.* at 17a.

Notwithstanding his diabetes, Lane compiled a fine record as a USMMA cadet. In his first year, he "achieved a 3.4 grade point average * * *, rowed crew, and participated in various sea-going activities." *Id.* at 18a. He had no medical problems associated with these endeavors, and those "most familiar with [his] abilities and control over his diabetes" confirmed that "he could complete his education and training at the Academy with little or no difficulty." *Id.* at 18a, 53a.

Nevertheless, in early September 1992, the Academy held a hearing to determine Lane's "medical suitability" for continuing at the USMMA. Academy officials verified that Lane was a diabetic; however, they "did not evaluate the particular circumstances of [his] case." *Id.* at 17a. Instead, the Academy's Superintendent simply advised Lane that diabetes was a "disqualifying condition." He was separated from the USMMA in December, half-way through his second year of school. *Id.* at 18a.

Lane challenged his separation before the Maritime Administration ("MARAD") Administrator. After considerable delay, the Administrator rejected this

---

(Letter from Frank R. Wolf, Member of Congress (R., VA), to James Griffin Lane, January 25, 1991) (confirming nomination), and 3 (Letter from Frank R. Wolf, Member of Congress, April 5, 1991) (notice of appointment).

challenge, stating that Lane's diabetes "disqualifie[d]" him from the USMMA. *Id.* at 19a.

Lane then filed suit in the federal district court, alleging that his exclusion from the Academy violated Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504" or "the Act"), which forbids discrimination on the basis of disability against "otherwise qualified individual[s]" in connection with "any program or activity conducted by any Executive agency." In addition to injunctive relief, Lane sought compensatory damages, "including out-of-pocket costs, loss of professional opportunity, and pain and suffering." Pet. App. 12a.

B. The Decisions of the District Court

On October 26, 1994, the district court granted summary judgment in Lane's favor, noting: "[i]t is undisputed that Section 504 is violated if: (1) the claimant has a disability; (2) he or she was denied participation in a federal program because of the disability; and (3) he or she was otherwise 'qualified' for the program." Pet. App. 50a. The court determined that the only issue in the case was whether Lane was "otherwise qualified to remain at the USMMA," and held that "the Defendants violated Section 504 of the Rehabilitation Act by disenrolling Lane solely on the basis of his diabetes and without making any attempt to reasonably accommodate his disability." *Id.* at 14a.

In support of this holding, the district court observed that "[t]he Stipulated Facts reveal that James Griffin Lane has repeatedly achieved an 'outstanding' rating on the physical readiness exam administered by the Academy * * * , that his physician has reported that his diabetes mellitus is under 'extremely good control,' and that the Academy has allowed students in the past with a lost limb, a lost eye, brain damage, and color blindness to remain at the Academy and graduate despite their disabilities." Pet. App. 14a. Moreover, "at least 50"

individuals with diabetes "are currently operating under a merchant marine license at sea." *Id.* at 38a; *see* J.A. 19. The court also stated: "[i]t is undisputed that, if Lane continues to control his diabetic condition, he will make a fine merchant marine officer"; and, finally, that upon "allowing Lane to graduate and become a merchant marine officer * * * the government will likely benefit greatly from his service." Pet. App. 53a, 54a.

To remedy this violation of Section 504, the district court first ordered Lane reinstated to the Academy. *Id.* at 57a.[2] Respondents did not dispute the propriety of this injunctive relief; neither did they dispute the permissibility of an attorneys' fee award against the United States due to its Section 504 violation.[3] Instead, as the court noted, the only dispute was "over whether [Lane] may recover compensatory damages against the government under Section 504." *Id.* at 57a. And significantly, as the court noted, respondents "do not contest" that monetary damages *are* available for violations of Section 504 by private parties and by other public entities. Rather, they argue only "that the doctrine of sovereign immunity protects *them* from a damage suit" under that Section. *Id.* at 58a (emphasis added).

The district court rejected respondents' argument for essentially three reasons: first, the 1978 Amendments to Section 504 expressly extended its discrimination prohibition to federal agencies; second, at the time of those amendments Congress knew the courts had found a

---

[2] Lane returned to the Academy in January 1995. By the summer of 1995, he had successfully completed six months sea training. He completed another semester of classroom work in the fall of 1995, and recently began a second six-month tour of sea training, which will end during the summer of 1996. In July 1996 he is scheduled to start his final year at the Academy.

[3] The district court specifically noted (Pet. App. 57a n.11) that under the Act "a prevailing party" may be allowed "a reasonable attorney fee as part of the costs." *See* Section 505(b) of the Act, 29 U.S.C. § 794a(b).

private right of action available for victims of Section 504 discrimination; and third, both the language and history of the Act make clear Congress' intent "'that there be no distinction in the [the statute's] enforcement against federal defendants,'" *i.e.*, that the damages unquestionably available against non-federal defendants should also be available against federal defendants. *Id.* at 59a-60a (quoting *Doe* v. *Attorney General*, 941 F.2d 780, 790 (9th Cir. 1991) and citing *J.L. & K.P.* v. *Social Security Admin.*, 971 F.2d 260, 264 (9th Cir. 1992) (reaffirming *Doe*)).

C. The *Dorsey* Decision

Less than two months after the district court granted Lane summary judgment on all counts, the D.C. Circuit held in another case that there is no "private right of action for monetary damages" against federal agencies under Section 504, expressly disagreeing with the Ninth Circuit's contrary holdings in *Doe* and *J.L. Dorsey* v. *United States Dep't. of Labor*, 41 F.3d 1551, 1552 (1994). J.A. 21-27.[4]

In reaching this view, the D.C. Circuit appeared to acknowledge that Congress intended a private right of action under Section 504, as indicated by *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and that Congress intended all appropriate relief to be available in those actions, as indicated by *Franklin* v. *Gwinett County Public Schools*, 503 U.S. 60 (1992). J.A. 25-26. Nevertheless, without addressing the effect of the 1978 Amendments expressly adding federal agencies to the prohibitions of Section 504, and without acknowledging the 1986 Amendments to the statute stating that the same "remedies both at law and in equity" are available "to the same extent" against all entities subject to the Act, the court of appeals summarily concluded that no dam-

---

[4] Because the D.C. Circuit subsequently summarily rejected damages to petitioner on the basis of *Dorsey*, the *Dorsey* opinion is included in the Joint Appendix for the Court's convenience.

ages could be had against the federal government because the statute contained no "unequivocal statutory expression to that effect." J.A. 27. In reaching this conclusion as to Congress' intent—without analyzing either the language of the statute as a whole, or its purpose, policies, or history—the court relied on this Court's decision in *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). It therefore disagreed with the Ninth Circuit's decisions in *Doe* and *J.L.*

D. The Parties' Stipulation on Damages Issues

In the wake of *Dorsey*, the parties reached a joint stipulation regarding the government's potential liability to Lane for compensatory damages. Pet. App. 8a-10a. First, the parties agreed that *Dorsey* required the district court to enter an order denying Lane's claim for damages. *Id.* at 9a. Second, the parties agreed that Lane would retain the right to pursue his entitlement to damages on appeal. And third, the parties stipulated that the amount of Lane's damages caused by the government's discrimination was $75,000. *Id.* at 9a-10a. Of that amount, the parties stipulated that $50,000 represented two years' lost income attributable to Lane's delayed graduation from the Academy and his delayed post-graduation employment; $15,000 represented his out-of-pocket expenses "for tuition and other related expenses incurred * * * between the time of his separation from the Academy in December 1992 and the * * * resumption of his studies at the Academy in January 1995"; and $10,000 represented his pain and suffering. *Id.* at 9a. Notwithstanding these conceded damages, based on *Dorsey* the district court entered judgment for the government on the issue of Lane's entitlement to damages. *Id.* at 5a-7a.

E. The Court of Appeals' Decisions in *Lane*

Lane appealed the district court's December 22, 1994 judgment in favor of respondents on the issue of damages. And initially, respondents appealed the district

court's determination of liability under Section 504 and its entry of injunctive relief "directing defendants to reinstate plaintiff at the USMMA." J.A. 28. However, respondents later voluntarily dismissed that appeal, thereby rendering final the district court's determinations: (1) that the respondents were subject to suit under 504; (2) that they violated that Section; and (3) that Congress authorized the awarding of injunctive relief against them under that Section.

Regarding the sole remaining disputed issue—Congress' intent regarding the availability of damages for federal-agency violations of Section 504—Lane moved for initial *in banc* consideration in the court of appeals in order to seek reconsideration of *Dorsey*. In the alternative, Lane urged summary affirmance of the district court's adverse decision, so that review could be promptly sought in this Court. Respondents subsequently filed their own Motion for Summary Affirmance. That Motion acknowledged that the only issue remaining in this case is "whether plaintiff may recover money damages under section 504 of the Rehabilitation Act for alleged disability discrimination in federal program[s]." J.A. 31.[5]

The court of appeals denied Lane's request for initial *in banc* review, Pet. App. 3a-4a, and granted the Motion for Summary Affirmance without opinion, *id.* at 1a-2a. This Court thereafter granted Lane's petition for a writ of certiorari on the question of damages.

SUMMARY OF ARGUMENT

Sections 504 and 505 of the Rehabilitation Act, as enacted in 1973, amended in 1978 and 1986, and reen-

---

[5] As noted, the discrimination in this case is not simply "alleged"; it has been judicially determined in a final, unappealed decision. In addition, that discrimination was intentional, *i.e.*, it involved specific acts of purposeful "disparate treatment" (*Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994)) "based solely on [Lane's] diabetes." Pet. App. 56a.

acted in 1992, together evidence Congress' clear intent to allow compensatory damages in private enforcement actions against any defendant, including federal agencies. Any other reading of the Act is implausible, in light of its language, its history, its purposes, its construction in the federal courts since 1973, and the presumption that unless Congress expressly provides to the contrary, it intends "all appropriate remedies" to be available, including money damages, when it creates a cause of action to vindicate federal statutory rights. *See Franklin*, 503 U.S. at 66.

The Court's sovereign immunity jurisprudence supports this reading of Congress' intent. For even in cases where sovereign immunity is implicated, this Court remains committed to giving statutes their common-sense reading using all available tools of statutory construction. Here those tools and that common-sense reading demonstrate quite clearly that Congress intended all defendants, including federal agencies, to be subject to the same remedies under the Act, and that those remedies include both equitable relief and monetary damages. Not one word in the statute suggests any differential remedial treatment among defendants, much less that only federal defendants are to receive special treatment and only for purposes of a damages exemption. Nothing in sovereign immunity law warrants any such implausible interpretation of this statute. It therefore should not be accepted by this Court when all other indicia of congressional intent are clearly to the contrary.

ARGUMENT

I. IN DETERMINING WHETHER CONGRESS INTENDED TO PERMIT MONEY DAMAGES IN THIS CASE, THE COURT SHOULD TAKE INTO ACCOUNT ALL RELEVANT INDICIA OF CONGRESSIONAL INTENT

The question in this case is whether Congress intended that Griff Lane be compensated through an award of money damages for the federal government's undisputed

violation of the Rehabilitation Act. This case thus necessarily involves the principle of sovereign immunity; that principle in turn raises the presumption that Congress did not intend to permit the award of such damages unless it unequivocally expressed its intention to do so. *See Nordic Village*, 503 U.S. at 33-34. The Court's task in determining the availability of damages in this case, therefore, "is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity." *United States* v. *Williams*, 115 S. Ct. 1611, 1616 (1995) (quoting *Nordic Village*, 503 U.S. at 33).

The D.C. Circuit, in *Dorsey*, rejected out of hand the contention that Congress intended monetary damages ever to be available for federal violations of Section 504, reasoning as follows:

> Because a § 504 private right of action for damages—against anyone—must be judicially implied from a statute silent on the subject, Dorsey is unable to point to any explicit language in the Rehabilitation Act * * * waiving the government's sovereign immunity. He therefore cannot prevail. [J.A. 26.]

Under this Court's cases, the D.C. Circuit's analysis is wrong for several reasons.

First, contrary to the view of the D.C. Circuit, determining whether Congress has waived immunity is not limited to looking in the statute for "explicit language * * * waiving sovereign immunity," and, if it is not there, ceasing the inquiry. Rather, waiver is a question "purely * * * of statutory *interpretation*" (emphasis added);[6] and, as this Court has often explained, waiver "is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver

---

[6] *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *see United States* v. *Mitchell*, 463 U.S. 206, 232 (1983) (Powell, J., dissenting) (in determining whether Congress has waived immunity, "the ultimate question is one of congressional intent") (internal quotations omitted).

can only be ascertained with reference to underlying congressional policy."[7] As a consequence, this Court may discern that intent through various different statutory formulations; indeed, Congress may clearly express the necessary waiver without ever uttering the words sovereign immunity at all. *See Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (Congress may abrogate the States' Eleventh Amendment immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment"); *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989) (in abrogating Eleventh Amendment immunity, "no magic words are required").[8]

Moreover, while the presumption that Congress does not intend to waive sovereign immunity is an important tool of statutory construction, it is not the *only* important tool available for ascertaining Congress' intent on the damage issue before this Court. Yet the D.C. Circuit used no other tools to discern that intent—such as analyzing the entirety of the statute, its history, and its purposes. In addition, it failed to apply other relevant presumptions about Congress' intent, including the presumption that Congress knew about and adopted pertinent decisions of this Court, such as *Franklin* v. *Gwinett County Public Schools*, *Cannon* v. *University of Chicago*, and *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), when it enacted the Rehabilitation Act and its amendments. The lower court's limited inquiry was clearly wrong. As Justice O'Connor has explained:

> Although it is indeed true that the Court construes waivers of sovereign immunity strictly, that principle

[7] *Franchise Tax Bd. of Calif.* v. *United States Postal Serv.*, 467 U.S. 512, 521 (1984) (quoting *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939)).

[8] The Court has applied similar standards to abrogations of the States' Eleventh Amendment immunity and waivers of the federal government's sovereign immunity. *See Nordic Village*, 503 U.S. at 37.

> of statutory construction is no more than an aid in the task of determining congressional intent * * *. The mere observation that a statute waives sovereign immunity * * * cannot resolve questions of construction. The Court still must consider all indicia of congressional intent. [*Block* v. *North Dakota*, 461 U.S. at 293-94 (O'Connor, J., dissenting).][9]

The D.C. Circuit not only failed to consider other critical indicia concerning Congress' intent; it also overlooked that application of a "clear statement" rule in a case such as this one (where constitutional values are not directly implicated) is appropriate *only* where Congress' intent on the underlying issue is otherwise "ambiguous" or "in question."[10] Here, as we will show, there is no ambiguity on the issue of what Congress intended, provided all pertinent indicia of congressional intent are considered. Indeed, when those indicia are considered, there is simply no plausible reading of Congress' intent except that it intended for Griff Lane's damages to be compensated by the government in this case.

[9] *Accord United States* v. *Lopez*, 115 S. Ct. 1624, 1658-59 (1995) (Breyer, J., dissenting with Stevens, Souter, and Ginsburg, JJ.) ("any clear statement rule would apply only to determine Congress' intended result"); *id.* at 1655 ("clear statement rules * * * are merely rules of statutory interpretation") (Souter, J., dissenting).

[10] *See, e.g.*, *Lopez*, 115 S. Ct. at 1624 (clear statement rules are to be used "when legislation leaves [Congress'] intent subject to question") (Souter, J., dissenting); *Hilton* v. *South Carolina Public Rys. Comm'n*, 502 U.S. 197, 205, 206 (1991) (clear statement rule is merely an ordinary "rule of statutory construction" that is "to be applied where statutory intent is ambiguous"); *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) ("plain statement rule" is a rule of "statutory construction to be applied where the statute is ambiguous") (citing *EEOC* v. *Wyoming*, 460 U.S. 226, 243-44 n.18 (1983)).

II. CONGRESS HAS CONSISTENTLY INDICATED ITS INTENTION THAT ALL VICTIMS OF DISABILITY DISCRIMINATION, INCLUDING VICTIMS OF FEDERAL-AGENCY DISCRIMINATION, SHOULD RECEIVE FULL AND EQUAL RELIEF

Respondents' position in this case is necessarily based on the view that Congress intended different forms of relief to be available for victims of discrimination by federal officials than for all other victims of discrimination. In fact, respondents' position must be based on the view that Congress intended full remedial relief (including attorneys' fees) to be available for all victims of disability discrimination—*unless* the discriminator is the federal government, in which case Congress intended to grant full declaratory and injunctive relief, and monetary relief in the form of attorneys' fees and back pay, but to exempt the federal government from the payment of money damages.[11] Indeed, under respondents' view, Congress would have allowed Lane to receive compensation if the discrimination at issue had caused him to lose income in the past (back pay), but it intended to deny him the $50,000 of his stipulated $75,000 in damages attributable to his lost income in the future.

There is simply no support for this view of Congress' intent anywhere in the statute, its history, its purposes, or the relevant case law. All of these indicators are directly to the contrary and convincingly demonstrate that Congress intended the federal government's liability

---

11 This must be respondents' position because, as noted: respondents have not challenged the availability of injunctive relief and attorneys' fees against the federal government in this case; they have not disputed the availability of monetary damages against non-federal defendants, as required by *Franklin;* and they cannot dispute the availability of back pay against federal defendants, as made clear in *Darrone*, 465 U.S. at 631 n.10 ("Congress clearly intended to make back pay available to victims of discrimination by the Federal Government") (citation omitted).

under Section 504 to be on an *equal footing* with all other violators of the Act.

A. The 1973 Enactment of Section 504 Created A Private Right of Action

In Section 504 Congress prohibited discrimination on the basis of disability by any person or entity receiving Federal financial assistance. It has long been settled that the 1973 language of Section 504 was patterned on and is almost identical to the language in Title VI, just as Title IX was when it was adopted in 1972. *Alexander* v. *Choate*, 469 U.S. 287, 293 n.7 (1985); *Darrone*, 465 U.S. at 626; *Cannon*, 441 U.S. at 694-95. And just as this Court found in *Cannon* that Congress intended a private right of action to be available for victims of discrimination under Titles VI and IX, and that Congress knew when it adopted Title IX that Title VI had been construed to confer a private right of action, 441 U.S. at 703, so too have the lower courts for similar reasons unanimously concluded that Congress intended a private right of action under Section 504.[12] As the United States stated in its brief to this Court in *Darrone*, the contention that Congress did not intend a private right of

---

12 Although this Court has never squarely ruled on the matter, it is settled law in the lower courts that Section 504 may be enforced by a private right of action. *See, e.g., Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d at 828 ("[E]very circuit that has addressed this question, including this one, has held that a private right of action exists"); Note, *Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act*, 1986 Duke L.J. 197, 197 ([F]ederal courts have uniformly agreed that an individual right of action is implied") (citing cases from ten circuits); Sarah Posten, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 604 Damages Issue*, 1992/1993 Ann. Survey Am. L. 419, 423-424 (Jan. 1994) (same).

Furthermore, in *Darrone*, which held that a Section 504 plaintiff may recover back pay, this Court acknowledged that lower courts have relied on *Cannon* "in holding that such a private right exists under § 504." 465 U.S. at 630 n.7.

action under Section 504 would be "inconsistent with the language and history of the Rehabilitation Act" and "cannot be squared with this Court's decision in *Cannon* * * *." Brief for the United States as *Amicus Curiae* Supporting Respondent at *12, No. 82-862 (U.S. July 10, 1983) (LEXIS, Genfed library, U.S. file).

Moreover, it has also long been settled that absent an express statutory intent to the contrary in Title VI, Title IX, or Section 504—of which there is none—Congress intended that all forms of relief—including damages—would be available to victims of discrimination bringing these authorized private rights of action. *Franklin*, 503 U.S. at 70-71 ("absent clear direction to the contrary by Congress, the federal courts have the power to award any relief in a cognizable cause of action brought pursuant to a federal statute").

Accordingly, when Congress adopted Section 504 in 1973 it unquestionably intended those protected by Section 504 to be eligible for money damages from those who violated it.

B. The 1978 Amendments to Section 504 Authorized Private Claims Against Federal Defendants Without Any Express Reservation or Limitation

In 1978, Congress amended Section 504 in three important ways. Taken together, these amendments make quite clear that Congress intended money damages to be available against federal defendants, just as they were already available against non-federal defendants.

First, Congress made Section 504 expressly applicable to all federal agencies. It did so by adding to the end of the first sentence of Section 504, which bars "discrimination under any program or activity receiving Federal financial assistance," the words "or under any program or activity conducted by any Executive agency or by the United States Postal Service." Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat.

2955, 2982. This amendment was a reaction to a Department of Justice opinion dated September 23, 1977, which declared the federal government exempt from the statute. *See* 1 Op. Off. Legal Counsel 210 (1977); 124 Cong. Rec. 13,901 (May 16, 1978) (statement of Rep. Jeffords); *id.* at 38,551 (Oct. 14, 1978) (same). Significantly, in promulgating regulations implementing this amendment, the Department of Transportation itself recognized that "the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, [was] that the Federal Government should have *the same section 504 obligations as recipients of Federal financial assistance.*" 56 *Fed. Reg.* 37292, 37292 (1991) (emphasis added).

Thus, as noted by the Ninth Circuit in *Doe*, Representative Jeffords stated in debates over the 1978 Amendments that their purpose was "simply [to] extend[ ] the coverage of section 504 to include any function * * * of the Federal Government * * * * I think this is fair and appropriate and should go a long way toward developing a *uniform* and equitable national policy for eliminating discrimination." 941 F.2d at 791 (quoting 124 Cong. Rec. 13,901) (emphasis supplied).[13] *See id.* at 791-92 (quoting 124 Cong. Rec. 38,552) ("No one should discriminate against an individual because he or she suffers from a handicap—not private employers, not State and local governments, *and most certainly, not the Federal Government*") (Rep. Sarasin) (emphasis added).

Significantly, at the time of this 1978 Amendment, the four federal courts of appeals addressing the issue

---

13 In *Cannon*, with regard to similar legislative history explaining the amendments to Title IX, the Court noted that it "would be remiss if [it] ignored [such] authoritative expressions concerning the scope and purpose" of the statute [there, Title IX], and "its place within [Congress'] civil rights enforcement scheme." 441 U.S. at 687 n.7.

already had unanimously concluded that Section 504 could be enforced through a private right of action.[14] And as *Cannon* made clear regarding the courts of appeals' similar constructions of Title VI at the time Title IX was adopted, it must be presumed: that Congress knew of the decisions construing Section 504; that those decisions reflected Congress' intent since, in reenacting the statute, Congress made no effort to reject the decisions; and that Congress "expected its enactment to be interpreted in conformity with them." *Cannon*, 441 U.S. at 696-98, 699. *Accord Franklin*, 503 U.S. at 71, 73; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982).[15] It follows that the extension of Section 504 in 1978 to cover "any [federal] program or activity" effectuated Congress' intent to afford a private right of action against any federal agency operating a program or activity in a discriminatory fashion.

In addition, and for the same reason, the Congress amending Section 504 in 1978 must be deemed to have known of and to have intended to implement the long-standing "traditional rule" described in *Franklin*, a rule that "has been the prevailing presumption in our federal courts since at least the early 19th century" (503 U.S. at 71-72), *i.e.*, that in the absence of an express statement

---

14 *See Davis* v. *Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977).

15 Furthermore, Congress expressly stated in amending the Rehabilitation Act in 1974 that it intended Section 504 to "permit a judicial remedy through a private action" in order to assure effective enforcement of the statute. S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6390-91. This Court twice previously has recognized this "virtually contemporaneous" legislative history as shedding "significant light" on the meaning of Section 504. *Alexander* v. *Choate*, 469 U.S. at 306-07; *accord Darrone*, 465 U.S. at 432-33.

to the contrary, Congress intended all remedies (including damages) to be available to implement the Section 504 cause of actions it had created.[16] And significantly, as *Franklin* makes clear, this presumed availability of all forms of relief has long applied to cases against the federal government. 503 U.S. at 66-67.[17] See further discussion of this point, *infra* at 32-34.

At the same time, there is *nothing* in Congress' approach or its language to support respondents' view that Congress envisioned *different* damage remedies for federal and non-federal defendants under Section 504. Rather, as the Ninth Circuit underscored in *Doe*, in extending the Act's nondiscrimination requirement to "Executive agenc[ies], * * * Congress did not make the amendment to [Section 504] a new section; it did not even use a new sentence." 941 F.2d at 790. Instead, it simply added federal agencies to the list of those subject to the Act. Congress thereby plainly intended "violations of the new clause to be enforced in the same way as violations of the pre-existing clause." *Id.* It clearly would not have chosen this means to effectuate

---

16 It has long been settled that the question of Congress' intent with regard to remedies is "analytically distinct" from the question whether a cause of action was created. *Davis* v. *Passman*, 442 U.S. 228, 239 (1979); *accord Franklin*, 503 U.S. at 65-66. As a result, once it has been determined that a cause of action was intended against the federal government under Section 504, it follows under *Franklin* that damages were intended as an available remedy in that cause of action. The D.C. Circuit in *Dorsey* confused these two separate issues when demanding "explicit language in the Rehabilitation Act" establishing a "§ 504 private right of action for damages" against federal agencies. J.A. 26.

17 Although in *Darrone* this Court did not have to reach the question of money damages under Section 504, as earlier noted the Court did hold in that case that "Congress clearly intended to make back pay available to victims of discrimination by the Federal Government * * *." 465 U.S. at 631 n.10. If Congress "clearly intended" back pay to be available, it is implausible to suppose—and there is nothing in the statute to suggest—that money damages were not to be available. *Franklin*, 503 U.S. at 75.

different or lesser damage remedies for federal as against non-federal defendants. *Id.*

Congress' other two 1978 amendments confirm this analysis. In Section 505(a)(2), Congress guaranteed to all plaintiffs in Section 504 cases the "remedies, procedures and rights set forth in Title VI." 29 U.S.C. § 794a(a)(2). And in Section 505(b), Congress approved attorneys' fees for all "prevailing parties" in Rehabilitation Act litigation, "other than the United States." 29 U.S.C. § 794(a)b. *See* 92 Stat. 2955, 2982-83.

In several ways, these two provisions confirm Congress' clear intent that damages should be available here. First, Congress nowhere differentiated among damage remedies available against federal and non-federal defendants, as respondents contend. Second, Congress expressed no reservation concerning the availability of *all* remedies under the "traditional rule" described in *Franklin*. Third, by expressly invoking the remedies available under Title VI, Congress confirmed that it intended damages to be available for violations of Section 504.[18]

Finally, by providing for attorneys' fees "in any action * * * to charge a violation" under the Act—except where the United States is a prevailing party—Congress both confirmed the availability of a private right of action and confirmed that when it wished to distinguish among parties with regard to remedies, it knew how to do so. Thus, having specifically limited the availability of one form of remedy in Section 505 *(i.e.*, no attorneys' fees for the United States), but not having elsewhere provided for any limitations or distinction among parties with regard to other remedies (including damages),

---

[18] In 1983, "a clear majority" of this Court confirmed in *Guardians Ass'n.* v. *Civil Service Comm'n of City of New York*, 463 U.S. 582 (1983) that damages are available under Title VI for intentional violations of that statute. *Franklin*, 503 U.S. at 70.

Congress clearly did not intend any. *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981); *see Russello* v. *United States*, 464 U.S. 16, 23 (1983). See further discussion of *Lehman*, *infra* at 34.

C. The 1986 Amendments Explicitly Rejected Any Distinction Between Private and Public Defendants with Regard to Remedies

Even if the 1978 Amendments did not make clear Congress' intent regarding the uniform availability of damages against all violators of the Act, the 1986 Amendments remove all doubt. In the latter Amendments, *see* 42 U.S.C. § 2000d-7, Congress first responded to this Court's decision in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1984), which had held that States were not liable to suit under Section 504 because they were nowhere expressly named in that Section.

Congress therefore specifically abrogated the States' Eleventh Amendment immunity under several statutes, including the Rehabilitation Act. More importantly for this case, Congress provided that:

> [i]n a suit against a State for a violation of [Section 504], remedies (*including remedies both at law and in equity*) are available for such a violation *to the same extent* as such remedies are available for such a violation in the suit against *any public or private entity* other than a State. [Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845, codified at 42 U.S.C. § 2000d-7(a)(2) (emphasis added).]

In *Franklin*, this Court held that the "remedies both at law and in equity" Congress referred to in this section are the full remedies contemplated under the "traditional rule," which includes damages. 503 U.S. at 72-73; *see*

id. at 78 (Scalia, J., concurring).[19] And, quite obviously, a federal agency—in this case, the Merchant Marine Academy—is a "public entity" against whom suit is otherwise authorized under Section 504.[20] Accordingly, the 1986 Amendments not only confirmed—again—that Congress had authorized a private right of action under

---

19 Because "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law," *Traynor* v. *Turnage*, 485 U.S. 535, 546 (1988), reenactment of Sections 504 and 505 in 1986 following consistent federal appellate rulings allowing damages under the Act further confirms that Congress intended such relief to be available in private Section 504 actions (citation omitted). *See Kling* v. *County of Los Angeles*, 769 F.2d 532, 534 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 936 (1985); *Carter* v. *Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984); *Marvin H.* v. *Austin Indep. School District*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Ciampa* v. *Massachusetts Rehabilitation Comm'n*, 718 F.2d 1, 5 (1st Cir. 1983); *Miener* v. *Missouri*, 673 F.2d 969, 977-78 (8th Cir. 1981), *cert. denied*, 459 U.S. 909 (1982). *See also Smith* v. *Robinson*, 468 U.S. 992, 1020 n.24 (1984) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504").

20 There is simply no plausible construction of the term "any public entity * * * other than a State" that would exclude the federal government — and thus the Merchant Marine Academy as one of its components — from the coverage of Section 504. *Cf. Block*, 461 U.S. 273 at 287 ("*any* civil action" makes no exception for civil actions by States) (emphasis in original); *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 312 (1978) ("any person" has a "naturally broad and inclusive meaning"); *International Union of Operating Eng'rs, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972) (term requiring arbitration of "any difference" provides "nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration"); *see also League of United Latin American Citizens* v. *Wilson*, 1995 WL 699583, at *20-21 (C.D. Cal. Nov. 20, 1995) (plain meaning of "any public entity" in California statute broadly covers *all* state entities). *Accord Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d at 831-32 (§ 2000d-7(a)(2) "goes beyond this simple overruling of *Atascadero*," and affirms that "Congress has not overturned the presumption towards the full panoply of damages in the case of § 504").

Section 504, but also made explicit that Congress meant the traditional all-remedies rule to apply to those actions (including damages) and to apply uniformly against all public and private entities subject to those actions.

D. The 1992 Amendments Reaffirmed Congress' Intention to Provide All Remedies Against Federal Defendants

Finally, in its most recent periodic reexamination of the Rehabilitation Act, Congress in 1992 once again reenacted Section 504 and 505 and did so without amendment. Under *Cannon*, *Merrill Lynch*, and *Franklin*, this reenactment plainly signaled Congress' knowledge of, agreement with, and adoption of this Court's determinations in *Franklin* that: (1) the Title VI remedies authorized in Section 505 include damages; (2) the 1986 Amendments confirmed *Cannon*'s recognition of a Section 504 private right of action; (3) all remedies are available against all entities made subject to that cause of action, including the United States (since the key authorities supporting Franklin's all-remedies analysis involved claims against federal officers, *see infra* at 32-34); and (4) the "remedies at law and in equity" referred to in the 1986 Amendments included damages.[21]

In light of the confirmation of these points in the 1992 Amendments, there is simply no room to plausibly argue that Congress exempted only one kind of Section 504 violator—Federal agencies—from only one kind of remedy—monetary damages. As Senator Jeffords stated during debate on the 1992 Amendments, it was the "intent of Congress in 1978 to cover the Federal Government with the same anti-discrimination mandate which is applied to private recipients of Federal financial assistance" and therefore "[t]here can be no doubt that

---

21 *See Lindahl* v. *OPM*, 470 U.S. 768, 782 n. 15 (1985) ("Congress is presumed to be aware of a[ ] * * * judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change").

the 1978 amendments to section 504 provided a private right of action for victims of discrimination by the Federal Government." 138 *Cong. Rec.* S16,609 (daily ed. Oct. 5, 1992).

Moreover, referring by name to the Ninth Circuit's *Doe* and *J.L. & K.P.* decisions, Senator Jeffords said that the Ninth Circuit has "correctly [held] that 'Congress in enacting section 504, *waived sovereign immunity* and created a private cause of action against the Government.'" *Id.* (quoting *J.L. & K.P.*, 971 F.2d at 269) (emphasis added). He further explained that "[i]t would be a disgrace to allow a private right of action against private entities receiving Federal financial assistance, but to deny *the same remedy* against the Federal government when it discriminates." *Id.* (emphasis added). Finally, Senator Jeffords declared that "[t]here is no need to amend the Rehabilitation Act to provide a private right of action against the Federal Government as some have suggested. The language of the 1978 amendments is sufficient on its face to confer such a private right of action." *Id.*

Taken together, the 1973 Act, the 1978 Amendments, the 1986 Amendments, and the 1992 Amendments unmistakably confirm what Senator Jeffords has stated. Moreover, as next shown, the policies and purposes of the Act as well as other pertinent principles of statutory construction—including those applicable to waivers of sovereign immunity—confirm this proposition still further.

E. The Underlying Policies and Purposes of the Act Reaffirm Congress' Intent Still Further

As noted, this Court held unanimously in *Franchise Tax Board of California* that Congress' "intent to waive [sovereign] immunity and the scope of such waiver can only be ascertained by reference to underlying congressional policy." 467 U.S. at 521. And with regard to the specific statutory provision at issue, the Court unanimously held in *Darrone* that "language as broad as that of Section 504 cannot be read in isolation from its history and purposes." 465 U.S. at 633 n.13.[22] Accordingly, in determining Congress' intent on the issue of damages against the U.S. Merchant Marine Academy, it is important to examine the purposes both of the nondiscrimination policy of Section 504 as well as the key amendments to that Section.

It is well-settled that Congress' "central purpose [in] § 504" was "to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals."[23] It is also well-settled that to achieve that purpose, Congress focused on "several substantive areas," including employment and education,[24] "in which it considered the societal and *personal costs of refusals to provide meaningful access to the handicapped to be particularly high.*" *Alexander* v. *Choate*, 469 U.S. at 306-07 (emphasis added).[25] Furthermore,

---

22 *Accord Southeastern Community College* v. *Davis*, 442 U.S. 397, 410, 411 (1979) (in construing Section 504, Court's "obligation[]" is to "honor the clear meaning of the statute, as revealed by its language, purpose, and history") (citation omitted).

23 *Traynor* v. *Turnage*, 485 U.S. at 548 (quoting *Alexander* v. *Choate*, 469 U.S. at 304, and *Southeastern Community College* v. *Davis*, 442 U.S. at 410).

24 *See, e.g.*, S. Rep. No. 1297, 93d Cong., 2d Sess. 28, 35 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400, 6407 ("Individuals with handicaps are all too often excluded from schools and educational programs * * *"; "[w]ithout adequate education, individuals with handicaps are doomed to a continued life as second-class citizens").

25 *Accord School Board of Nassau County* v. *Arline*, 480 U.S. 273, 278 n.3 (1987) (discussing focus of 1974 Amendments on expanding protection against "discriminatory practices in education * * * stemm[ing] from stereotypical attitudes and ignorance"); *id.* at 284 (primary purpose of Section 504 "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others").

as we have shown, it is quite clear from the 1978 and 1986 Amendments and their history that Congress' purpose in those amendments was to place the federal government on an "equal footing" with other entities regarding its responsibilities to enhance the stated goals, and to encourage private enforcement of those goals by granting full remedial relief and attorneys' fees to those who were discriminated against.[26] *See Doe*, 941 F.2d at 792.

Plainly, all of these congressional goals, purposes, and policies would be thwarted by denial of money damages in this case to Griff Lane. He was intentionally denied

---

26 As presented in more detail by the *Amici Curiae* Brief of the American Association of Retired Persons, *et al.*, in support of petitioner, this Court repeatedly has recognized the crucial role played by damages relief in advancing Congress' goals under the civil rights laws; that is, such relief (1) encourages private enforcement, (2) deters future violations, and (3) makes victims whole. *See, e.g.*, *McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995); *City of Riverside* v. *Rivera*, 477 U.S. 561, 575 (1986) (plurality); *Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980); *Carey* v. *Piphus*, 435 U.S. 247, 253-58 (1978); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763-65 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975); *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

Furthermore, in legislative debate, members of the Senate made clear that the attorneys' fees provision of the 1978 Amendment was "intended * * * to parallel" the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988, which itself was premised on the thesis that "civil rights law[s] depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate [such] congressional policies." *Doe*, 941 F.2d at 792 (quoting S. Rep. No. 1011, 94th Cong., 2d. Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910). In particular, Senator Cranston declared that private enforcement of protections secured by Title V of the Rehabilitation Act was a "necessary aspect of assuring that these rights are vindicated and enforcement is *uniform*." *Doe*, 941 F.2d at 972 (quoting 124 *Cong. Rec.* 30,346) (Sept. 20, 1978) (emphasis added).

educational opportunity and impeded in his career based solely on his disability. As a result, he brought the very enforcement suit Congress encouraged, in order to be made whole for the precise harm Congress prohibited, by requesting that the discriminator pay undisputed "personal costs" he had borne and which Congress found unacceptable. Had this harm and these costs been imposed on him by a private party or a *state* merchant marine academy, he indisputably would be entitled to money damages for this harm and these costs.[27] In these circumstances, it is inconceivable that Congress intended to deny him relief simply because he chose instead to attend the *United States* Merchant Marine Academy.

III. THIS COURT'S SOVEREIGN IMMUNITY JURISPRUDENCE CONFIRMS THE AVAILABILITY OF DAMAGES AGAINST FEDERAL DEFENDANTS UNDER SECTION 504

The only remaining question is whether this Court's sovereign immunity jurisprudence requires that Congress' clear intent to permit damages in a case such as this must be rejected. For several reasons, it does not.

First, as noted, that jurisprudence is not a substitute for considering the other indicia of congressional intent. To

---

27 State merchant marine academies are plainly covered by Section 504. *See, e.g.*, *United States* v. *Massachusetts Maritime Academy*, 762 F.2d 142, 144, 148 (1st Cir. 1985) (in suit brought by U.S. under Title IV of the 1964 Civil Rights Act based on state maritime academy's receipt of federal funds, court of appeals indicates academy would be subject to private enforcement action under Title VI). In 1994 and 1995, federal aid to six state merchant marine academies exceeded $9 million. Each school received "direct annual payments," "incentive payments in support of [student] cadets," "suitable vessels for use as training ships," as well as subsidies for "alteration, maintenance and repair of such vessels." *See* 46 U.S.C. § 1295(c); *Justification of the Budget Estimates: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 104th Cong., 1st. Sess. 775, 806-07, 809-10 (1995) (fiscal year 1996 budget submission by MARAD, Department of Transportation).

the contrary, sovereign immunity analysis is simply one tool that may be used in discerning that intent, and it becomes useful only when that intent is otherwise ambiguous. *See supra* at 12-13. Here, as shown, Congress' intent is clear.

Second, this Court's sovereign immunity cases actually confirm that Congress intended damages to be available here. The cases that best illustrate the Court's approach to the issue are *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), and *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

In *Nordic Village* the Court determined the extent to which Congress waived the immunity of the United States for claims against it by bankrupt estates. As the Court explained, in Section 106 of the Bankruptcy Code[28] Congress contemplated three different situations in which such claims might be brought: as compulsory counterclaims; as permissive counterclaims; and as

---

28 At the time *Nordic Village* was decided, Section 106 provided as follows:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units. [11 U.S.C. § 106 (1988)].

claims in all other situations. As the Court also explained, in Section 106(a) and (b), respectively, Congress clearly waived sovereign immunity (including for damages) for compulsory counterclaims, and for permissive counterclaims (again including for damages), but capped by a setoff limitation. 503 U.S. at 34. However, the Court concluded that "[n]ext to these models of clarity," Section 106(c), which governed other types of claims against the government in bankruptcy, did not waive sovereign immunity for damages. *Id.* This conclusion was based on the observation that Congress clearly intended that different treatment be given to claims under the three different subsections of Section 106, and that subsection (c) was ambiguous and could plausibly be interpreted to waive the immunity of the government for declaratory and injunctive relief but not for monetary relief. *Id.* at 34-35.

The statutory scheme in this case is entirely different and serves entirely different purposes. Unlike the three subsections of Section 106 of the Bankruptcy Code, each addressing sovereign immunity for a different type of claim against the government, the Rehabilitation Act treats all defendants and all claims against the government identically. Thus, in Section 504, private and public entities (including federal agencies) are uniformly made subject to the nondiscrimination provision; in Section 505, Title VI remedies are made uniformly available against all these entities; and in the 1986 Amendments all legal and equitable relief is uniformly made available against all these entities. There is, quite simply, not one word in the Act limiting remedies against any of these entities or in any way differentiating their liability. And there is certainly no counterpart here to Section 106(c) of the Bankruptcy Code, which affirmatively distinguished between declaratory and injunctive relief on the one hand, and monetary relief on the other. Accordingly, unlike the Bankruptcy Code, there is nothing in the Rehabilitation Act that plausibly raises an ambiguity about Congress' intent on that point, much

less an affirmative indication that Congress meant to carve out *only* federal defendants for exemption *only* from damages. Rather, all affirmative indications are to the contrary.[29]

Fitzpatrick v. *Bitzer* confirms that Congress' approach here was more than sufficient to waive sovereign immunity for damages. In that case, then-Justice Rehnquist, writing for the Court, noted that Congress effectively abrogated the States' Eleventh Amendment immunity for money damages in the form of back pay under Title VII simply by adding "governments" to the list of those covered by that statute, and by including government employees in the class of persons who could bring suit if dissatisfied with the administrative handling of their claim. 427 U.S. at 449 n.2. This was held sufficient to abrogate immunity for payment of back pay even though abrogation was never mentioned in the statute and even though the section of Title VII that allows back pay as a remedy was not amended to specifically include governmental defendants. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; and *compare* 42 U.S.C. § 2000e-5(f) (including "government" as a respondent in section describing administrative procedures) *with* § 2000e-5(g) (section providing back pay as remedy omits "government").

Furthermore, although abrogation was not disputed by the parties in *Fitzpatrick*, the brief of the United States argued at length that the stated amendments were sufficient to show Congress' clear intent to abrogate the States' Eleventh Amendment immunity and contended that "to suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet." Brief for the United States as

---

29 Indeed, as noted, the single time Congress drew any distinction among parties subject to the Act, it did so solely to deny attorneys' fees to the United States.

Amicus Curiae at 19, *Fitzpatrick* v. *Bitzer*, Nos. 75-251 and 75-283 (citation omitted).

What happened in *Fitzpatrick* happened here. In 1978 Congress added "Executive agencies" to Section 504 coverage just as Congress had added "governments" to Title VII coverage in 1972. And just as this Title VII amendment was sufficient to abrogate the government's immunity regarding relief otherwise available under that Title, so too was the "Executive agency" amendment sufficient to waive those agencies' immunity regarding relief otherwise available under Section 504—which unquestionably has always included damages under *Franklin*.

In fact, this case is stronger than *Fitzpatrick*. For even if the 1978 Amendment to Section 504 alone was not sufficient under *Fitzpatrick* to demonstrate the requisite waiver, that amendment in conjunction with other parts of the Act would certainly be sufficient to do so. In Section 505 Congress specified that remedies available under the Act would be those under Title VI (which includes damages), and that those remedies would include attorneys' fees. And in the 1986 Amendments, Congress reaffirmed that equitable and legal remedies would be available without limitation against all covered entities, both public and private.

Nowhere in these provisions did Congress differentiate among different remedies available to affected parties; and nowhere did it limit monetary relief against any covered entity. As *Nordic Village* and other cases demonstrate, Congress knows how to limit remedies or differentiate among parties as to available remedies when it chooses to do so. And in fact it did so here with regard to denying attorneys' fees to the United States in Section 505. Accordingly, having not incorporated any distinction or limitation with regard to damages against federal agencies in the Rehabilitation Act, it cannot be thought to have intended any such limitation. *See Lehman* v. *Nakshian*, 453 U.S. at 162 (when Congress

expressly provided for jury trials in ADEA actions against state and local defendants, but not against federal defendants, it intended no waiver of federal immunity regarding jury trials).

This analysis is confirmed still further by *Franklin*. There, as noted, this Court unanimously held that money damages may be recovered in a suit brought under Title IX and reaffirmed the traditional rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71. This rule, the Court said, is "well settled" and "has deep roots in our jurisprudence." *Id.* at 68, 66. It can hardly be disputed that this rule applies to Section 504, just as it did to Title IX, inasmuch as both were patterned on Title VI. Nor can there be any dispute that the rule applies to federal and non-federal defendants alike. For although *Franklin* itself was not a case against the federal government, the key decisions cited by the Court in tracing the "deep roots" of the rule all involved suits against the federal government or federal actors.

Thus, the Court first quoted *Bell* v. *Hood* for the principle that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). *Bell* v. *Hood* concerned an action for money damages against FBI officers and held that the district court had jurisdiction to entertain the suit. *Id.* at 685. Next, the *Franklin* Court discussed *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), which involved a suit against the Secretary of State. The *Franklin* Court also relied on *Dooley* v. *United States*, 182 U.S. 222, 229 (1901), a suit against the United States to recover duties improperly collected, for "the principle that a

liability created by statute without a remedy may be enforced by a common-law action."[30]

Perhaps most significantly, the *Franklin* Court relied on *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). As explained in *Franklin*, *Kendall* involved "an act of Congress that accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but which did not specify the precise remedy available to the carriers." 503 U.S. at 67. *Kendall* held that the mail carriers were entitled to payment from the government on the ground that it would be "a monstrous absurdity" to give the carriers a right without that remedy. 37 U.S. at 624. Significantly, in reaching this holding the *Kendall* Court expressly rejected the argument of Attorney General Butler that sovereign immunity barred the relief sought. He had contended that because "[t]he United States are the real party defendants; the object of the suit being to cancel balances in the treasury books, and to reach public moneys in the treasury," the suit is subject to the "the general objection, that the government is not suable, except when it chooses to waive its immunity in this respect." *Id.* at 587.

The *Franklin* Court relied on *Kendall* for the proposition that the federal judiciary's authority to award all appropriate relief—including damages—"historically has been thought necessary to provide an important safeguard against abuses of legislative and *executive power*." 503 U.S. at 74 (emphasis added). It is just such an abuse of executive power that is at issue in this case and that Congress expressly prohibited in Section 504. And, as the *Franklin* Court made clear, failure to effectuate Congress' intent to make damages available for the abuse of executive power presented here "would harm

---

30 As its source for this proposition, the *Dooley* Court in turn relied on another case against the federal government, *United States* v. *Kaufman*, 96 U.S. 567 (1877).

separation of powers principles * * * by giving judges the power to render inutile causes of action authorized by Congress * * *." 503 U.S. at 74.

Other sovereign immunity cases confirm still further the appropriateness of construing Congress' waiver in this case against the backdrop of the all-remedies principle recognized in *Franklin*. In *Lehman* v. *Nakshian*, the Court held that in past instances of waiving sovereign immunity the Congress "almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial." 453 U.S. at 161. Accordingly, in construing the scope of the waiver in that case, the Court assumed that no jury trial was authorized unless Congress said so expressly. *Id.* at 162. Similarly, in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), the Court held that "[f]or well over a century, this Court, executive agencies, and Congress itself consistently have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result." 478 U.S. at 316. Accordingly, even though Congress waived the federal government's sovereign immunity with regard to damages under Title VII, the Court concluded that this waiver could not include interest, since Congress had not separately, expressly authorized it. This was so, the Court said, because "waivers of sovereign immunity to suit must be read against the back-drop of the no-interest rule." *Id.* at 319.

Here, by contrast, the undoubted waiver of sovereign immunity created by the Rehabilitation Act must be read against the back-drop of the traditional rule confirmed in *Franklin*, *i.e.*, that all remedies are presumed to be available when Congress creates a cause of action, unless Congress expressly provides to the contrary. Here, Congress clearly has not done so, and the waiver now at issue should be construed in light of that principle, just as in *Lehman* and *Shaw* the waiver was construed in light of the no-jury and no-interest principles presented in those cases.

Finally, in determining whether Congress intended to waive sovereign immunity as to damages, three other principles of statutory construction apply here, all of them overlooked by the D.C. Circuit in *Dorsey*, and all of them confirming that Congress intended a waiver. First, because the presumption against waiver is in turn premised on the presumption that Congress would have wanted to avoid certain intrusions against the federal government,[31] the nature and degree of that intrusion should be examined in the case at hand. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). Here, it is conceded that injunctive relief and attorneys' fees are permitted against the government; and it must also be conceded that Congress intended back pay to be available against the government.[32] As a result, the only question is whether Congress intended to permit these three intrusions, but still forbid money damages. This is surely implausible, for the reasons suggested by the Court in *Larson*:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the

---

31 *See Larson*, 337 U.S. at 704 ("The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief") (quoting *Decater* v. *Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840)).

32 *Darrone*, 465 U.S. at 631 n.10.

> Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. [337 U.S. at 703-04.][33]

Second, it must be recognized that whether Congress intended to waive sovereign immunity at all is a different issue than the one presented here: the *scope* of the waiver Congress clearly intended. In the latter situation, "the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'"[34] Here, where all statutory indications are that Congress intended the United States to be treated equally with all other defendants and that all such defendants be subject to all traditional forms of relief, including damages, it would "narrow the waiver" to exclude the United States from damages liability.

---

33 *Larson* was confirmed in *Franklin*, where the Court observed that to suppose that Congress intended to grant equitable relief under Title IX, but not legal relief, "conflicts with sound logic." 503 U.S. at 75. As the Court noted, "it is axiomatic" that "[u]nder the ordinary convention" legal relief (including damages) is to be considered before equitable relief is resorted to. *Id.* at 75, 76. There is nothing here to indicate that Congress intended to depart from this long-standing principle.

34 *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (quoting *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979)). *See United States* v. *Williams*, 115 S. Ct. at 1620 (1995) (Scalia, J., concurring) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced") (quoting *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949), quoting *Anderson* v. *John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)). *See also United States* v. *Mitchell*, 463 U.S. 206, 213 (1983) ("it is 'as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals'") (quoting President Lincoln's 1861 State of the Union Message, printed in *Cong. Globe*, 37th Cong., 2d Sess., App. 2 (1861)).

If there still remains any doubt concerning the extent of Congress' waiver in Section 504, the last important principle of statutory construction should resolve that doubt in Griff Lane's favor. This Court's sovereign immunity cases hold that when a statute is designed by Congress to create new rights for the protection of a group of individuals, the Court should liberally interpret any waiver of sovereign immunity appearing in the statute in order to benefit those individuals. For example, in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), the Court interpreted a waiver of sovereign immunity contained in the Social Security Act. In support of its determination that Congress intended its waiver to include the doctrine of equitable tolling to the statute of limitations, the Court considered that "[t]he statute of limitations we construe * * * is contained in a statute that Congress designed to be 'unusually protective' of claimants." *Id.* at 480 (citation omitted).

This principle was recently articulated in the dissent of Chief Justice Rehnquist in *United States* v. *Williams*, *supra*, a case construing Congress' waiver of sovereign immunity under the Internal Revenue Code. There, the Chief Justice noted that the majority's interpretation of the Tax Code sections at issue would be proper "[i]f this case involved the interpretation of a statute designed to confer new benefits or rights upon a class of individuals * * * since such a statute would be 'entitled to a liberal construction to accomplish its beneficent purposes.'" 115 S. Ct. at 1623-24 (Rehnquist, C.J., dissenting) (citing *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949) (construing the Jones Act) and *Atchison, T. & S.F.R. Co.* v. *Buell*, 480 U.S. 557, 562 (1987) (Federal Employers' Liability Act "is a 'broad remedial statute'" which must be given a "'liberal construction'")). However, such an interpretation was not proper, concluded the *Williams* dissenters, when interpreting a statute like the Tax Code. *Id.*

Like the Jones Act and the Federal Employers' Liability Act, and unlike the Tax Code, the Rehabilitation Act is a broad remedial statute intended to confer new rights on a class of individuals and, accordingly, it is entitled to a liberal construction.[35] Therefore, the waiver Congress included in the Rehabilitation Act is entitled to a liberal construction in order to benefit those, like Griff Lane, who have been discriminated against by the government and monetarily harmed thereby. Indeed, if the Court concludes that Congress intended that damages are never available for the federal government's violations of Section 504, it is inevitable that some victims of those violations will be left completely without a remedy.[36] In *Williams* and *Franklin*, this factor reinforced the Court's conclusion that Congress intended to waive sovereign immunity. 115 S. Ct. at 1618; 503 U.S. at 76. It should likewise do so here.

* * *

In determining the scope of a congressional waiver of sovereign immunity, the Court prefers "common sense inquiries over formalism," *Williams*, 115 S. Ct. at 1618, and it does not permit those waivers "to be given a meaning that is implausible." *Id.* at 1620 (Scalia, J. concurring). Here, the only sensible, plausible reading of Section 504 is that Congress meant to put federal

35 *See Traynor* v. *Turnage*, 485 U.S. at 548 ("central purpose of § 504 * * * is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals") (citations omitted); *Darrone*, 465 U.S. at 634 (discussing the "remedial purpose of the Rehabilitation Act"); *Johnson* v. *Runyon*, 47 F.3d 911, 917 (7th Cir. 1995) ("Rehabilitation Act is remedial legislation that must be construed liberally to effectuate its purposes"); *Heilweil* v. *Mount Sinai Hosp.*, 32 F.3d 718, 722 (2d Cir. 1994) ("the [Rehabilitation] Act is a remedial statute * * * to be construed broadly"), *cert. denied*, 115 S. Ct. 1095 (1995).

36 *See, e.g., Doe*, 941 F.2d at 784 (holding injunctive claims moot, leaving only claims for damages where plaintiff has become too ill during the course of litigation to perform his job).

agencies on an equal footing with non-federal parties when it added those agencies to that section in 1978, that it knew that such equal footing included liability to a private action in which full legal and equitable relief would be available, that it confirmed this view in its 1986 and 1992 Amendments, and that it intended someone like Griff Lane to be made whole for the undisputed discrimination and harm the government has caused him.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

WALTER A. SMITH, JR.*
DANIEL B. KOHRMAN
AUDREY J. ANDERSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington D.C. 20036
(202) 457-0800

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

* Counsel of Record

Counsel for Petitioner